STATE OF MICHIGAN

IN THE SUPREME COURT

CHARTER TOWNSHIP OF NORTHVILLE,

Plaintiff,

-and-

HEATHER SCHULZ and JEFFREY SCHULZ; MARY LOWE and GEORGE LOWE; ERIC HANPETER and LAURA HANPETER; FRANK CORONA and MARCELLA CORONA; DAVID MALMIN and LEE ANN MALMIN; JOHN MILLER and DEBRA MILLER; TOM CONWELL and EVY CONWELL; MARY BETH YAKIMA and DAN YAKIMA; RICHARD LEE and PATTY LEE; BETH PETERSON and RICK PETERSON; JOHN BUCHANAN; KEN BUCHANAN; LARRY GREGORY and NANCY GREGORY; K. MAUREEN WYNALEK and JAMES WYNALEK; HAROLD W. BULGER and SANDRA BULGER,

Intervening Plaintiffs-Appellants,

v

NORTHVILLE PUBLIC SCHOOLS, a Michigan municipal corporation; LEONARD R. REZMIERSKI, Superintendent; and THE BOARD OF EDUCATION OF NORTHVILLE PUBLIC SCHOOLS,

Defendants-Appellees.

SUPREME COURT NO. 120213

Court of Appeals Docket No. 219124
Circuit Court Case No. 98-816747 CZ

MICHIGAN TOWNSHIPS ASSOCIATION AND MICHIGAN MUNICIPAL LEAGUE'S BRIEF AMICUS CURIAE IN SUPPORT OF INTERVENING PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page No.

MICHIGAN CONSTITUTION

MICHIGAN SUPREME COURT

MICHIGAN COURT OF APPEALS

CIRCUIT COURT

MICHIGAN COMPILED LAWS

OTHER MATERIALS

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STATEMENT OF ISSUE PRESENTED

IS A PUBLIC SCHOOL AND ITS BOARD OF EDUCATION, IN THE DEVELOPMENT AND LOCATION OF A PUBLIC SCHOOL SITE, IMMUNE OR EXEMPT FROM REASONABLE LOCAL MUNICIPAL ZONING REGULATIONS DESIGNED FOR THE PROTECTION OF THE HEALTH, SAFETY AND GENERAL WELFARE OF THE SURROUNDING COMMUNITY IN WHICH THE PROPOSED SITE IS PLANNED TO BE LOCATED?

Plaintiff/Appellant and Intervening Plaintiffs/Appellants answer "no."

Defendants answer "yes."

Amicus Curiae answers "no."

STATEMENT OF FACTS

Amicus Curiae, Michigan Townships Association and Michigan Municipal League, hereby incorporates in full the statement of facts set forth in Intervening Plaintiffs/Appellants' Brief and the Statement of Material Facts and Proceedings set forth in Intervening-Plaintiffs/Appellants' Brief on Appeal, on file in the within cause.

ARGUMENT I

PUBLIC SCHOOLS AND THE BOARDS OF EDUCATION FOR SUCH SCHOOLS IN THE LOCATION AND DEVELOPMENT OF PUBLIC SCHOOL SITES, ARE SUBJECT TO AND MUST COMPLY WITH REASONABLE LOCAL MUNICIPAL ZONING ORDINANCE REGULATIONS DESIGNED TO PROTECT THE HEALTH, SAFETY AND GENERAL WELFARE OF THE COMMUNITY AS SPECIFIED IN THE ZONING ENABLING ACTS PERTINENT TO SUCH LOCAL MUNICIPALITIES.

All Michigan statutes delegating zoning authority to local municipalities include authority to regulate the use of land for education, recreation, and other public service facilities to promote public health, safety and general welfare of their communities.

A. Township Rural Zoning Act.

Section 1 of the Township Rural Zoning Act found at MCL 125.271, provides in pertinent part:

> "The Township Board of an organized Township in this state may provide by zoning ordinance for the regulation of land development, which regulate the use of land and structures; to meet the needs of the state's citizens for places of residence, recreation...service, and other uses of land; natural resources; to ensure that the use of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population...and other public facilities; to facilitate adequate and efficient provision for...education, recreation, and other public service and facility requirements; and to promote public health, safety and welfare.... Ordinances regulating land development may also be adopted designating or limiting the location...the area of yards, courts, and other open spaces, and the sanitary, safety, and protective measures that shall be required for the dwellings, buildings and structures ...erected or altered."

Section 3 of that act further provides in pertinent part:

> "The Zoning Ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare; to encourage the use of lands in accordance

with their character and adaptability, and to limit the improper use of land; to conserve natural resources and energy; to meet the needs of the state's residents for...places of residence, recreation,...service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to avoid the overcrowding of population; to provide adequate light and air; to lesson congestion on the public roads and streets; to reduce hazards to life and property; to facilitate adequate provision for a system of...education, recreation, and other public requirements;...to conform with the most advantageous uses of land, resources, and properties. The Zoning Ordinance shall be made with reasonable consideration, among other things, to the character of each district; its peculiar suitability for particular uses; the conservation of property values and natural resources; and the general and appropriate trend and character of land, building, and population development." (Emphasis added).

B. The City and Village Zoning Act.

Similarly, the City and Village Zoning Enabling Act found at MCL 125.581, provides in Section 1 in pertinent part:

"The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for... places of residence, recreation, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for... education, recreation, and other public service and facility needs; and to promote the public health, safety and welfare...." (Emphasis added).

Section 3(2) of that Act further provides in pertinent part:

"The legislative body of a city or village may use this Act to adopt land development regulations and districts which apply only to land areas and activities which are involved in a special program to achieve specific land management objectives and avert or solve specific land use problems, including the establishment of land development regulations and districts in areas subject to damage from flooding or beach erosion, and for that purpose may divide the city or village into districts of the number, shape, and area best suited to accomplish those objectives." (Emphasis added.)

C. The City, Village and Municipal Planning Act.

The City, Village and Municipal Planning Act found at MCL 125.31, which applies by definition to cities, villages, townships, charter townships, and other incorporated political subdivisions provides at Section 9 of that act in pertinent part:

"Whenever the Commission (Planning Commission) shall have adopted the master plan of the municipality...no street, square, park, or other public way, ground, or open space, or public building or structure shall be constructed or authorized in the municipality or in such planned section and district until the location, character, and extent thereof shall have been submitted to and approved by the Commission (Planning Commission)..." (Emphasis added)

D. The Township Planning Act.

The Township Planning Act found at MCL 125.321, which applies to Michigan Townships, provides at §7 of that Act, in pertinent part:

"(1) The basic plan shall include maps, plats, charts and descriptive, explanatory and other related matter and shall show the Planning Commission's recommendations for the physical development of the unincorporated area of the township.

(2) The basic plan shall include those of the following subjects which reasonably can be considered as pertinent to the future development of the township:

(a) A Land Use Plan and program, in part consisting of a classification and allocation of land for agricultural, residents, commerce, industry, recreation, ways and grounds, public buildings, schools, soil conservation, forest, wildlife refuge and other uses and purposes. (Emphasis added.)

The statute further provides at §10, in pertinent part:

"Whenever the Planning Commission has adopted the basic plan of the township of one or more major sections or districts thereof, no street, square, park or other public way, ground or open space, or public building or structure, shall be constructed or authorized in the township or in the planned section and district until the location, character and extent thereof, shall have been submitted to and approved by the Planning Commission. (Emphasis added.)

E. The County Rural Zoning Enabling Act

The County Rural Zoning Enabling Act found at MCL 125.20(1) also provides in pertinent part:

"The County Board of Commissioners...may provide by zoning ordinance for the establishment of land development regulations and districts in portions of the county outside the limits of cities and villages which regulate the use of land; to meet the needs of the state's citizens for...places of residence, recreation,...service and other uses of land; to ensure that the uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate congestion of population and the overcrowding of land... and other public facilities; to facilitate adequate and

efficient...education, recreation, and other public service and facility needs; and to promote public health, safety, and welfare." (Emphasis added).

The County Act further provides at Section 3 in pertinent part:

"The Zoning Ordinance shall be based upon a plan designed to promote public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability and to limit the improper use of land, to conserve natural resources and energy, to meet the needs of the state's citizens for...natural resources, places of residence, recreation...and other uses of land, to ensure that uses of lands shall be situated in appropriate locations and relationships,...to facilitate adequate provision for a system of...education, recreation and other public needs...The ordinance shall be made with reasonable consideration, among other things, to the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources...and the general and appropriate trend and character of land, building, and population development" (Emphasis added).

F. Analysis of Zoning Enabling Statutes

From a review of the language contained in the foregoing zoning enabling statutes, it is clear that the legislature has granted comprehensive authority to cities, villages, townships, charter townships, and counties to regulate land use within their respective jurisdictions to protect health, safety and general welfare of their respective communities. Furthermore, the legislature has specifically, in all of the statutes, authorized zoning regulations over "education", "recreation" and "other public facilities." In the Township Planning Act "public buildings" and "schools" are specifically placed under Township Planning authority. The other statutes pertaining to cities, villages and counties grant authority over "public buildings" and "public facilities". This authority has been repeated by the legislature in various amendments to these statutes through the last amendment effective May 17, 1995 for cities and villages; and effective February 26, 1996 for townships, charter townships, and counties.

Although the Zoning Enabling Acts above referred to have exempted certain aspects of oil and gas well development and operation from local zoning control and granted it to the director of the DNR (MCL 125.271(1) with respect to townships) and (MCL 125.201(1) with respect to counties); has limited the zoning control of state licensed residential facilities (MCL 125.286(a)

pertaining to townships), (MCL 125.216(a) pertaining to counties) and (MCL 125.583b pertaining to cities) and has made other inroads into local zoning authority, the legislature has not seen fit to make any inroad in these acts with respect to zoning authority over "public buildings", "schools" and "education and recreation". This zoning authority remains unaltered notwithstanding Cody Park Ass'n v Royal Oak School District, 116 Mich App 103 (1982), wherein the court held the high school was required to comply with the City of Royal Oaks' zoning ordinance which prohibited its proposed improvements without obtaining a special use permit from the city. The court emphasized in Cody there was no language in the school code which indicated any superior authority in the school district which would allow it to claim immunity from local zoning. As stated at the bottom of page 108:

> "Although a school district is recognized as a state agency, nevertheless it is guided by local school boards. It cannot be said such a local school board should have greater or lesser powers over local zoning ordinances unless such authority is specifically designated by the legislature. A careful reading of the school code fails to reveal such a legislative intent."

Similarly, the legislature did not see fit to amend local enabling zoning statutes following the Court of Appeals decision in Lutheran High School Ass'n. of Greater Detroit v City of Farmington Hills, 146 Mich App 641 (1985), which again held that a parochial school was subject to reasonable, local zoning regulation. The Lutheran court in dismissing any school exemption argument indicated at 650 that "all zoning ordinances hold a presumption of validity", and that "Michigan churches and schools may be regulated to the same extent as any other land use." It further stated at footnote 1:

> "Plaintiff also argues that such legislative intent may be found in the statute governing the construction of public and private school buildings, MCLA 388.851; MSA seq 15.1961. The statute concerns construction requirements and in no way manifests a legislative intent that schools not be subject to local zoning ordinances." (Emphasis added).

In the unpublished Court of Appeals decision of O'Brien v East China Township School District and City of St. Clair, decided January 6, 1995, Docket No. 161780 (attached hereto for

convenience as Attachment A), the court held that the 1990 amendment to the School Code did not "preempt local zoning regulations which do not interfere with the state superintendent's 'sole and exclusive jurisdiction over review and approval of plans and specifications for the construction, reconstruction, or remodeling of school buildings...and of site plans for those school buildings'." In support, the court sited the Cody Park Ass'n case, herein cited supra.

On August 3, 1999, the Circuit Court for the County of Washtenaw in the case of New Beginnings Academy, Inc. v City of Ypsilanti, under Docket No. 99-10608CE, with Honorable Melinda Morris, presiding (attached hereto for convenience as Attachment B), discussed the jurisdiction delegated to the superintendent of public instruction concerning school construction and upheld the authority of the City through its Zoning Ordinance to determine the location of the proposed public school. As stated by the court on page 8 of the attached decision,

> "Furthermore, none of the provisions or requirements of the city's ordinance conflict in any way with the school statute. That there are two sets of application procedures with which plaintiffs must comply in order to build their school does not create a conflict where, as it appears here, the requirements are not contradictory or mutually exclusive."

The location of the school in the Washtenaw circuit court case was subject to a special use permit, which because of its location next to a bar, was denied.

The foregoing cases have been further recently supported by the case of Addison Township v Department of State Police, 220 Mich App 550 (1996) wherein on remand from the Michigan Supreme Court, the Court of Appeals held that the statute pertaining to state police communication towers did not grant immunity or exemption from township authority to regulate the location of such towers under the authority of the Township Rural Zoning Act, cited supra. The Court of Appeals reiterated that there was insufficient language in the state police statutes to grant any exclusive jurisdiction in the state police to locate towers within a municipality regardless of the municipality's zoning regulations.

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Further recent cases on the overriding authority and control of local zoning over developments by other governmental agencies are Township of Burt v State of Michigan, DNR, 459 Mich 659 (1999) and Capital Region Airport Authority v Charter Township of DeWitt, 236 Mich App 576 (1999). In the Township of Burt case, the issue involved the authority of township zoning over the location by the DNR of a boat launching site at Burt Lake. After reviewing the Court's previous decision in Dearden v Detroit, 403 Mich 257 (1978), and the statutory authority granted the DNR to construct facilities for vessels, charge fees for the use of state-operated public access sites, acquire property by eminent domain, etc., the Court concluded that the "extensive authority to regulate the use and development of land" granted to townships in the Township Rural Zoning Act, without including any exemption for state developments by the DNR was persuasive of legislative intent to subject the DNR's boat launching site to local zoning control. At page 669 the court stated:

> "... we decline to require that the legislature use any particular talismanic words to indicate its intent. The legislature need only use terms that convey its clear intention that the grant of jurisdiction given is, in fact, exclusive. Whatever terms are actually employed by the legislature, our task is to examine the various statutory provisions at issue and attempt to discern the legislative intent in enacting them."

In the Court's conclusion on page 671, it further stated:

> "In sum, the NREPA and the TRZA appear to provide coextensive statutory rights concerning the protection of natural resources in general and the development of recreation facilities and other waterfront developments in particular. Moreover, nothing in the NREPA establishes a clear expression of legislative intent to exempt the DNR's activities in this case from the Burt Township Zoning Ordinance."

On this latter point in this Northville School case, the appropriate interpretation of the involved statutory provisions is the "coextensive statutory rights" of the school superintendent to review school building site plans to insure the safety of the buildings and students therein from incompatible site and adjacent uses and the township's rights to enforce their reasonable zoning ordinance provisions designed to protect the community at large and adjacent property owners. Although the word "exclusive" in MCL 380.1263(3) of the 1990 revisions to the School Code was relied upon by the circuit court and Court of Appeals in the current Northville case to indicate pre-

emption over local zoning, it relates to jurisdiction over plans and specifications for construction of instructional and non-instructional school buildings which had not previously been clear as to non-instructional buildings. It did not relate to nor indicate pre-emption over local zoning ordinances. If such had been intended, it would have been simple for the legislature to have specified "zoning" along with "construction".

In the Capital Region Airport Authority case, the Court of Appeals was confronted with the issue of whether township zoning of DeWitt Township was applicable to non-aeronautic development in the nature of a business park proposed by the Airport Authority. Again, the Court analyzed the statutes pertaining to the Airport Authority, the Township Rural Zoning Act, and the Dearden and Burt Township cases, cited supra. It concluded that the Supreme Court in the Burt Township case had "rejected the focus on 'exclusive jurisdiction language'" and concentrated on the intent of the legislature.

In addition to finding support in its decision supporting Township Zoning authority controlling over non-aeronautic development at the airport, the Court emphasized that the Township Rural Zoning Act was silent with respect to airports while exempting oil and gas wells and licensed residential facilities. It then stated in support of its conclusion that there was no legislative intent to exempt non-aeronautic development at airports in the Township Rural Zoning Act:

> "Under the maxim 'expressio unis est exclusio alterus,' (the expression of one thing is the exclusion of another), this court has stated that the express mention of one thing in a statute implies the exclusion of other similar things.... Thus, by making express exemptions in the TZA for wells and residential facilities, the legislature precluded findings of implicit exemptions for other land uses." (Citations omitted.) (Page 9 of the citation.)

Finally, in the very recent case of Frens Orchards, Inc. v Dayton Township Board, 2002 Mich App Lexis, 1326, decided September 24, 2002, by the Michigan Court of Appeals and attached hereto as Attachment C for convenience, the court was confronted with the issue of whether or not state statutes and administrative rules regarding migrant labor housing pre-empted

township zoning ordinances. After reviewing four criteria for pre-emption, including expressed statutory language, legislative history, pervasiveness of a state regulatory scheme, and the need to achieve uniformity throughout the state, the court held on pages 4 and 5 of the attached opinion:

> "In some, a reading of the pertinent sections of the zoning ordinance in conjunction with the cited statutes reveals that the ordinance addresses concerns not affected by the statutes and administrative rules discussed above. Therefore, the state's regulation is not so pervasive that it would support a finding of pre-emption."
>
> "With regard to the location of the housing within a township, however, this is not the case. Zoning ordinances can address the unique residential, commercial, and agricultural needs of each township, unlike statewide regulations."
>
> "Using this test, we find that no conflict exists here because the state regulations do not address the subject of the zoning ordinance–the location of a use of land within the township."

Local municipalities under their respective zoning enabling statutes are concerned with protecting health, safety and general welfare of their communities. School boards and boards of education are concerned with safe and efficient education of students. This is their primary interest and not the public health, safety and general welfare of the surrounding community. Without local zoning, this latter protective interest would be delegated to and safeguarded by no one. As shown by the deposition of Carol Wohlenberg, Deputy Superintendent for Administration and Support Services representing the state superintendent of public instruction, at pages 10 and 11 of her deposition found at Exhibit P of Appellants' Appendix, filed in the Court of Appeals:

> "We (the superintendent of public instruction) are designated to review construction plans. It is my understanding that these plans first go to the Department of Consumer and Industry Services and the State Fire Marshal. They are reviewed by those two agencies. Those two agencies notify staff of the department of education. The department of education then by statute will give the final approval for construction."

Continuing on pages 21 and 41-42 of said deposition at said Exhibit P, the following occurs:

Page 21.

> "Q. (By Ms. Friedlaender, continuing) And if I understand you correctly, did you testify before that there is no one on your staff with the expertise to review construction plans?
> A. Correct.
> Q. And would you agree also that there is no one on your staff with the expertise to review site plans?
> A. Correct."

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Page 41-42.

"Q. (By Ms. Friedlaender, continuing) So the site plan does not come to your office, to your staff?
A. No, it does not.
Mr. Butler: You mean in general or with Northville? You mean in general?
Q. (By Ms. Friedlaender, Continuing) My first question is in general?
A. No.
Q. With Northville?
A. No.
Q. Has the superintendent approved the site plan for Northville?
A. To the best of my knowledge, we have not.
Q. Do you have any idea of when in the process the Superintendent will be reviewing the site plan for approval?
A. When we receive approval from Community (sic) and Industry Services, both Fire Marshal and Bureau of Construction Code that they have approved the final plans, then we can issue an approval.
Q. Once you get the notice form them that they've approved the plans or recommending your approval, will you see the plans then?
A. No.
Q. So you will never see the plans?
A. To the best of my knowledge we will not."

Exhibit Q of Appellant's said Appendix in the Court of Appeals contains the Deposition of Dan Dykstra who was identified on page 9 of said Exhibit Q as the assistant deputy director in the Department of Consumer and Industry Services, having duties to "oversee the plan review functions and manage the plan review staff as well as clerical support staff that goes along with that and I also assist in developing new rules for the Office of Fire Safety."

His said deposition on pages 45 and 46 of said Exhibit Q discloses the following concerning his understanding of "site plan" review:

"The Deponent: We have discussed what it actually means as far as our responsibilities under the Act.
Q. (By Ms. Friedlaender, continuing) And what is it that you believe it means in terms of your responsibilities under the Act?
Mr. Lusk: Objection to the extent it calls for a legal conclusion.
Ms. Friedlaender: I'm not asking for a legal interpretation.
Q (By Ms. Friedlaender, continuing) Just in your bureau, what's your understanding?
Mr. Lusk: Same objection.
The Deponent: Our understanding of that term in this reference is that it means the same thing it would in a typical instructional school review that we review site plans to the extent that are covered in the school fire safety rules for things such as exiting from the building, location of the building in relation to other facilities such

as if there was a – or were a fuel storage facility next door, we would have concerns about that.
But again, it's very limited in what our rules cover as far as site issues.
Q. (By Ms. Friedlaender, continuing) Do you have rules that cover site issues?
A. No. There are no rules in the fire safety regulations other than what I discussed; exiting requirements to a public way, for instance, which could be a parking lot, it could be a yard or a court of something kind. There are very few site issues in the fire safety rules.
Q. Okay. And so when you review – if this is right. When you review a site plan, you're reviewing it in terms of whatever site provisions there are in the fire safety rules?
A. Correct?
Q. And nothing else?
A. Correct."

On pages 53 and 55 he testified that in his review, he would only be concerned with any existing hazards off the school site to the school building and would not have concern on how the school facility might impact adjacent property. Further, he had no knowledge of any department within the state government that would be concerned with the impact of the school on adjacent property. These pages disclose the following questions and answers:

Page 53 to 55

"Q. When you review a site plan, are you looking at it to determine whether the site design contains adequate open space?
A. Our rules don't address it. So, no.
Q. When you review site plans, do you have any regulations or standards as part of your rules in terms of lighting on the site? Like the height of lighting or its brightness, its incandescence?
A. No.
Q. Your review of the site plan, does it relate at all to – do you look at all – any issues about noise or potential noise impact from the site?
Mr. Butler: Object. Asked and answered.
The Deponent: No.
Q. (By Ms. Friedlaender, continuing) You don't have any standards that cover that in your site plan review?
A. Correct.
Q. Is your site plan review that you conduct concerned in any way with the impact of the design of the school site on adjacent property?
A. The concern we would have again would be to adjacent facilities. Whether it's a hazard to the school buildings such as the bulk storage plant that I mentioned, we would be concerned about proximity in relation to what's around the school facility.
Q. Terms of it causing conflagration at the school facility?
A. Correct. Because the school facility is the one we have authority over.
Q. Are you concerned at all with how the school facility impacts adjacent property?

A. Am I concerned about –
Q. Yes.
A. – or do the rules address it?
Q. Do the rules address that?
A. The rules don't address that.
Q. And your site plan review does not address that, true?
A. Correct."

The deposition of Irvin Poke disclosed on page 10 of Exhibit R of Appellants' Court of Appeals Appendix that he is the chief of Planned Review Division of the Department of Consumer Industry and Services in charge of overseeing the plan review of buildings constructed under state jurisdiction which included school buildings. The following then appears on page 20 of said Exhibit R.

"Q. I see. So, as far as your bureau's role in the approval of plans for the construction of school buildings, is it fair to say it is limited, then, to barrier free design rule, electrical review, and sometimes upon request, plumbing and mechanical review?
A. Yes."

On page 27 of his said deposition, the following appears:

"A. We don't look at school buildings in proximity to the property lines.
Q. You don't do that kind of review.
A. No.
Q. You have no standards for that kind of review.
A. We have no authority for that kind of review.
Q. Okay. In your review of plans for school buildings, are you reviewing all – and I know this sounds obvious – but are you reviewing at all the impact of the design of the school building or the design of the site on adjacent property?
A. No."

The foregoing witnesses clearly indicated neither the state department of education nor any of its assisting state agencies were ever concerned about the impact of the proposed school construction on adjacent properties, did not review any plans with such concerns in mind, only reviewed the construction aspects of the project and knew of no requirements or standards for such other plan review.

ARGUMENT II

THE 1990 AMENDMENT TO THE SCHOOL CODE WAS NOT INTENDED TO AND DOES NOT ELEVATE SCHOOL BOARD'S AUTHORITY ABOVE REASONABLE LOCAL ZONING REGULATIONS.

MCL 380.1263(3), as amended in 1990, provides as follows:

> "The board of a school district shall not design or build a school building to be used for instructional or non-instructional school purposes or design and implement the design for a school site unless the design or construction is in compliance with Act 306 of the Public Acts of 1937, being Sections 388.851 to 388.855a of the Michigan Compiled Laws. The superintendent of public instruction has sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction, or remodeling of school buildings used for instructional or non-instructional school purposes, and of site plans for those school buildings." (Emphasis added).

Act 306 of 1937, as amended, above referred to, relates in its enabling section specifically to "construction, reconstruction, and remodeling of certain public or private school buildings or additions thereto." The Act proceeds to specify certain construction requirements. In Section 1(e) it provides as far as design or building site plans, the following:

> "In all cases, there shall be at least two stairways and the distance from the door of any class or assembly room to a stairway or exit shall not exceed 100 feet." (MCL 388.851.)

This requirement relates to the interior site plan of the building as opposed to quality or type of construction. Amicus Curiae submit the words and phrases in the above quoted 1990 amendment "school site" and "site plans for those school buildings" refers to this kind of interior design of the building and other safety features for the building and students therein and not to zoning regulations. Furthermore, said Act 306 only refers to "school buildings, public or private, or additions thereto." Neither said Act 306 nor the 1990 amendment, hereinbefore quoted and underlined, in any manner, refer to zoning issues such as location within the community, screening, setback, lighting, off-street parking requirements, traffic safety, drainage, exterior noise control, entrances and exits from public roads and other elements of site plan review and conditional use requirements contained in local zoning ordinances.

This distinction between construction and "site plans for those school buildings," and local zoning regulations is emphasized in Section 2 of the State Construction Code found at MCL 125.1502, wherein "construction regulation" is defined at subparagraph (m), in pertinent part, as follows:

> "Construction regulation does not include a zoning ordinance or rule issued pursuant to a zoning ordinance and related to zoning."

Zoning ordinances do not relate to construction, but to the classification of land for particular uses with pertinent regulations for the protection of adjacent property owners and residents and the community in general. Even if "school site" and "site plans for those school buildings" could be construed to apply to more than the building itself, which Amicus Curiae vigorously rejects, zoning ordinances cover many different facets of land use than "site plan review." They include, for example, the classification of designated lands for permitted uses such as residential, commercial, industrial, institutional, and various subcategories of the foregoing. They further include special land use provisions permitting certain specified uses only after public hearings and compliance with conditions and limitations specified for the approval of the same. Ordinances are also authorized to provide for planned unit developments involving clustered development and multiple compatible uses, again following public hearings concerning the same. Ordinances contain provisions for continuation of permissible non-conforming uses and variance procedures before a zoning board of appeals. These typical zoning provisions have nothing to do with "site plan review" which is authorized in a separate section of the Township Zoning Act at MCL 125.286e, in a separate section of the City and Village Zoning Act, at MCL 125.584d, and in the County Rural Zoning Enabling Act, at MCL 125.2216e.

These zoning enabling acts provide authority in the local units to require by ordinance, approval of a "site plan" before authorization of any land use or activity regulated by a zoning ordinance. Site plan review is stated in the enabling acts to be "necessary to insure that a

proposed land use or activity is in compliance with the local ordinance and state and federal statutes." Regardless of any site plan review under the zoning statutes and ordinances or the school code, the specific provisions and regulations contained in the local zoning ordinances pertinent to schools must be complied with under the forgoing statutory provisions.

Again, Amicus Curiae would emphasize that "site plan review" is only one minor element in a municipal zoning ordinance; is not related to a proposed building itself, but only the exterior elements of a site; and the protection of the health, safety and welfare of adjacent property owners and residents; traffic safety and the protection of the general community. These zoning regulations do not conflict with the 1990 amendment to the school code hereinbefore quoted which we submit is intended to pertain to the building only and its protection from dangerous or incompatible adjoining uses and structures, which would adversely impact on the building and the students therein.

The legislative analysis accompanying the 1990 amendment to the School Code, which code was hereinbefore quoted in pertinent part, supports the foregoing interpretation of the amendment and the corresponding intent of the legislature. It is attached at Exhibit M of Appellants' Court of Appeals Appendix and obviously is concerned with including "non-instructional school buildings" in the superintendent's exclusive jurisdiction over building construction. As stated under the following headings in pertinent part of the second analysis of House Bill #5451 under the heading "School-Related Construction":

> **"The Apparent Problem:**
>
> Also, during its plans to build a number of school-related facilities (bus garage, tennis courts), and other 'non-instructional' buildings; the Birmingham School District discovered that some of its design and site plans conflicted with various local building codes. The conflict in this specific instance caused some people to wonder just how state law treats non-instructional school buildings. At issue is whether all school-related buildings (rather than just 'instructional' ones) are governed by Public Act 306 of 1937, the School Construction Code, or by the State Construction Code.

If non-instructional buildings are covered under the latter, they are also subject to local building codes.

"Though Public Act 306 does not clearly specify whether it applies to non-instructional buildings, some people–relying on earlier Attorney General Opinion–feel non-instructional design and site plans should be subject to approval by state authorities, only, and believes the school code should be amended to provide for this."

"<u>The Content of the Bill</u>:

* * * * *

Finally, the bill specifies that a school district board could not design or build a school building to be used for instructional or non-instructional school purposes or design and implement a design for a school site unless the design or construction complies with Public Act 306 of 1937. Under the bill, the superintendent of public instruction would have sole and exclusive jurisdiction over the review and approval of plans and specifications for construction-related work done on instructional or non-instructional school buildings, as well as over site plans for the buildings."

* * * * *

"<u>Arguments</u>:

* * * * *

"<u>For</u>:

By prohibiting school boards from designing or building school buildings used for instructional or non-instructional purposes unless design plans conform with requirements of Public Act 306 of 1937, the bill would clarify that this act (and not the State Construction Code Act) would apply to 'school' buildings that were not specifically meant for instructional purposes. Apparently, some recent judicial interpretations have indicated that school buildings such as those (for instance, a bus garage) are subject to local control. Also, as some school districts have territory which lies in different municipalities, questions have arisen over whose building code guidelines apply in specific situations. The bill specifies that final authority over school-related construction plans would belong to the superintendent of public instruction. (This authority actually belongs to the Department of Education under Public Act 380 of 1965. According to a DOE spokeswoman, review of school related design and construction plans is currently done under an interagency agreement between the department and other state agencies)

Response:

According to the Legislative Service Bureau, rather than citing Public Act 306 via the School Code, Public Act 306 should be directly amended to indicate (or clarify) its authority over design and site plans for both instructional and non-instructional school buildings."

"<u>Against</u>:

* * * * *

Response:

"Regardless of the cost, the state is responsible to see that all school-related construction meets appropriate safety standards. Apparently, according to a spokesman from the Birmingham school district, since 1982 the state has reduced the amount of time and money it spends on reviewing both design and site plans for school construction. Such actions seem irresponsible and could threaten the safety and well-being of school children throughout the state."

"Against:

Due to conflicting opinions on who is responsible for design and site plan approval on school-related buildings, this issue should be dealt with separately and more comprehensively. Amending the school code to try and clarify the issue would merely make matters worst. Clarifying legislation should address the proper acts: the School Construction Act (Public Act 306 of 1937) and the State Construction Code Act."

It should be recognized that Act 306 of 1937 only relates to construction and design of school buildings and has nothing to do with zoning and zoning regulations for those buildings. The purpose of the amendment in 1990 was to clarify the authority of the Department of Education over the construction of non-instructional school buildings similarly to what has existed over instructional school buildings. This was clearly recognized by the legislature in the forgoing legislative analysis.

It is appropriate and not uncommon for the court to look to the legislative history to ascertain the purpose of the Act and the meaning of its provisions. (See In Re. Brezezinski, 214 Mich App 652 (1995).)

Amicus curiae submits a logical interpretation of the school code language "school site" and "site plans for those school buildings" refers to the interrelationship between instructional and non-instructional buildings constructed on the school site and to the buildings themselves and not to zoning authority involving the protection of the health, safety and welfare of the community.

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ARGUMENT III

LAWS CONCERNING TOWNSHIPS, COUNTIES, CITIES AND VILLAGES MUST BE LIBERALLY CONSTRUED IN THEIR FAVOR.

Article VII, Section 34 of the Michigan Constitution provides as follows:

> "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

The Supreme Court in applying this constitutional provision in Square Lake Hills Condominium Ass'n. v Bloomfield Township, 437 Mich 310 (1991), and upholding the township's authority to control riparian rights in its zoning ordinances, stated at 319:

> "The delegates to the 1961 Michigan Constitutional Convention replaced the common law rule of strict construction by constitutionally requiring courts to liberally construe all legislation and constitutional powers conferred upon townships. Const. 1963, Art. VII, Sec 34; see also, (1) official record, Constitutional Convention 1961, pp 1048-1058. While this constitutional directive does not provide an independent grant of authority for townships to act in a particular area, its mandate of liberal construction does provide a framework for analysis of Bloomfield Township's arguments...."

In the Supreme Court case of Hess v West Bloomfield Township, 439 Mich 550 (1992) which involved the authority of a township zoning ordinance to regulate dock construction and the number of boats which could be moored thereat, the court in upholding the validity of the township zoning ordinance stated at 563:

> "An indication of the legislative concern for the environment is apparent from the clause that was added to MCL §125.271; MSA §5.2963(1) in 1978, providing that townships shall have the authority to enact zoning ordinances to 'promote public health, safety and welfare.' This indicates that a much broader grant of authority was intended by the legislature when it amended the TRZA in 1978...."

Certainly a liberal construction of the three zoning enabling statutes and planning acts, hereinbefore referred to, would clearly support townships', cities', villages' and counties' authority to regulate the location and development of school grounds for the health , safety and welfare of the community and surrounding property owners and residents. The Supreme Court in the Township of Burt decision, cited supra, alluded to this state constitutional provision on page 666,

where it indicated that the language in the Township Rural Zoning Act to "conserve natural resources" is enhanced by the liberal construction provisions of the constitution to include zoning authority over boat launching sites of the DNR. Similarly such liberal construction mandate in the constitution elevates all local municipal zoning authority to a pre-eminent status over all other land use authority that is not clearly and specifically stated to be an exception thereto.

ARGUMENT IV

STATUTES MUST BE APPLIED AS WRITTEN AND NOT AS SCHOOL ADMINISTRATORS OR OTHERS WOULD PREFER.

A liberal construction of the statutes pertaining to cities, villages, counties and townships, zoning authority over the location of and exterior development of schools for the protection of the health, safety and welfare of the community, precludes any strained exemption of schools from such authority.

A succinct and fairly comprehensive review of the law of statutory interpretation is found in the case of Portelli v I.R. Construction Co., Inc., 218 Mich App 591(1996) at 606 where the court states as follows:

> "The primary intent of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. Farrington v Total Petroleum, Inc., 442 Mich 201, 212, 501 N.W. 2d 76 (1993). The first criterion in determining intent is the specific language of the statute. House Speaker v State Administrative Bd, 441 Mich. 547, 567, 495 N.W. 2d 539 (1993). The Legislature is presumed to have intended the meaning it plainly expressed. Frasier v Model Coverall Service, Inc., 182 Mich. App. 741, 744, 453 N.W. 2d (1990). Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. Nat'l Exposition Co. v Detroit, 169 Mich. App. 29, 425 N.W. 2d 497 (1988). Where the language employed in statute is plain, certain, and unambiguous, the statute must be applied as written without interpretation. Wayne Co. v Dept. of Corrections Director, 204 Mich. App. 712, 714, 516 N.W. 2d 535 (1994). When the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. Lorenz v Ford Motor Co., 439 Mich. 370, 376, 483 N.W. 2d 844 (1992). Such a statute must be applied, and not interpreted, because it speaks for itself. In re: Schnell, 214 Mich. App. 304, 310, 543; N.W. 2d 11 (1995)." (Emphasis added).

The zoning enabling acts hereinbefore cited are comprehensive, clear and unambiguous in authorizing local governments to regulate land development within their respective jurisdictions,

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including "schools", "public buildings" and "education." There is no indication that the legislature intended to remove that authority with respect to the development and location of schools and school grounds. The 1990 amendment to the school code hereinbefore referred to does not controvert this comprehensive zoning authority. No governmental interest will be served by eliminating this zoning authority. In fact, the local municipal government's goals of protecting the health, safety and welfare of persons and property within the vicinity of schools and within the community should not be offensive or contrary to the goals of public education. Schools should have no better right to disrupt a neighborhood than any other private or public activity. If the zoning regulations are unreasonable, the boards of education have ample remedies through the courts in setting aside such unreasonable regulations. Where they are reasonable, they should be complied with and enforced by the judiciary.

On the school side, the language of the statute clarifying construction authority over "instructional and non-instructional" school buildings and giving the superintendent of public instruction authority to review and approve "site plans for those school buildings" is certainly not a clear pre-emption of local zoning, should be interpreted in harmony with the clear language of the zoning enabling acts, and accordingly, should be limited to the school buildings themselves and the protection and the safe guarding of students therein from dangerous or obnoxious conditions existing on or adjacent to the site.

ARGUMENT V

THE LANGUAGE OF THE SCHOOL CODE CONCERNING THE AUTHORITY OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION TO REVIEW AND APPROVE "SITE PLANS FOR THOSE SCHOOL BUILDINGS" CANNOT PREEMPT LOCAL ZONING CONTROL WHERE SUCH AUTHORITY IS DEVOID OF STANDARDS TO GUIDE SUCH REVIEW AND APPROVAL

The only standards pertinent to the superintendent's review and approval pertain to the construction of school buildings as set forth in MCL 388.851 to MCL 388.855(a), referenced in the School Code. These standards, for example, relate to State Fire Marshall requirements, Health

Department requirements effecting water supply, sanitation and food handling, and certain specified construction requirements. (See MCL 388.851.) As indicated in the depositions of Carol Wohlenberg, Deputy Superintendent of Administration and Support Services in the Department of Education and Daniel Dykstra, Assistant Deputy Director of the Department of Consumer & Industry Services, previously referred to in this Brief and in the Brief of Intervening Plaintiffs/Appellants, the only site plan review standards pertain to building construction. No zoning type site plan review standards are provided for on behalf of the state education department. Furthermore, it has never even been attempted to be exercised on the state or school district level.

Without any standards to guide site plan review of external features of a school development, the language of the School Code, granting authority to review and approve "site plans for those school buildings" must be limited to construction, building design and materials to have any validity or effective meaning. This position is supported by both the language of the 1990 amendment to the revised School Code and the law on the requirement of standards to accompany any delegation of authority.

1990 P.A. 159, in pertinent part, added subsection 3 to MCL 380.1263, as a new subsection which related to mandatory procedures and standards for the design and construction of "school buildings used for [both] instructional and non-instructional school purposes and of site plans for those school buildings." This same subsection 3 further provided:

> "The Board of the school district shall not design or build a school building to be used for instructional or non-instructional school purposes or design and implement the design for a school site unless the design and construction is in compliance with Act No. 306 of the Public Acts of 1937, being §388.851 to §388.855a of the Michigan Compiled Laws." (Emphasis added.)

Act 306 referred to, as previously explained, contains only building requirements and no school site requirements unrelated to building safety. It is significant that "school site" in the preceding statute is located within that portion of subsection 3 which relates to design and construction under said Act 306. Being in the same subsection 3, the term "site plans for those

school buildings" must obviously relate to the design and construction of institutional or non-institutional school buildings and not to zoning issues regulated under the various zoning enabling statutes.

These site plan and school site words being in the same statutory section should be considered in pari materia and have the same common meaning. As stated by the court in State Highway Commissioner v Detroit City Controller, 331 Mich 337 (1951) at 358:

> "As we stated in Rathbun v State of Michigan, 284 Mich 521, 544: 'statutes in pari materia are to be construed together and repeals by implication are not favored. The courts will regard all statutes upon the same general subject matter as part of one system and later statutes should be construed as supplementary or complimentary to those preceding them.'"

The court further stated at 363, in quoting from a previous Supreme Court decision:

> "Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience and to oppose all prejudice to public interests.
>
> "An Act will not be construed to repeal or modify earlier legislation, if, giving such effect to the Act, an apparent purpose would appear to disturb an established system of written law, covering a vital field in our system of government.
>
> "The principle that the law does not favor repeals by implication is of special application in the case of an important public statute of long standing which should be shown to be repealed either expressly, or by a strong and necessary implication.
>
> "When a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention shall be considered an exception to the general one." (Citations omitted.)

The foregoing would apply to similar words in the same statute, as well as to different statutes in pari materia. In addition, with regard to the current Northville case, it would apply to the correlation between the aforementioned School Code provisions and the various previously cited zoning enabling statutes. The long standing zoning enabling statutes should not be construed to have been repealed with respect to school development by implication accompanied by a strained construction of the language of the School Code. As stated in the State Highway Commissioner case, supra, at 358,

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"It is the usual rule of statutory construction that apparently conflicting statutes should be construed, if possible, to give each full force and effect."

The language of the 1990 amendment to the School Code, hereinbefore quoted, together with the complete lack of standards to guide any zoning decisions by the superintendent of public instruction certainly emphasize and affirm an interpretation of the School Code provisions to apply solely to construction and design of buildings and not to the preemption of zoning authority of cities, townships, villages and counties, delegated by the state legislature for the protection of the health, safety and general welfare of the community and involved neighborhoods.

On the subject of unlawful delegation of authority, a succinct and informative discussion supported by many cited judicial decisions is found at §25.216, Vol 8A of McQuillin's Municipal Corporations where it is stated in pertinent part as follows:

"Zoning ordinances cannot confer arbitrary or unlimited power or authority upon boards or officials. Moreover, zoning measures must establish a rule or standard to govern boards and officials charged with their administration and to guarantee uniformity of operation in all cases. This is a fundamental constitutional rule applicable to all municipal legislation. To allow the granting or refusal of zoning permits, certificates or the like by an administrative board or officials, without any standard to guide them, denies equal protection of the law and is invalid. Accordingly, while administrative officers may be vested with discretion, they cannot be given power to evolve and apply rules as may seem to them appropriate, regardless of organic guarantees and in contravention of the settled doctrine forbidding the delegation of legislative power. Thus, zoning regulations imposed to promote the health, welfare, safety and morals, must be based upon rules fixed in the ordinance with such certainty that they are not left to the whim or caprice of any administrative agency." (8A McQuillin, Mun Corp §25.216 (3rd Ed))

In the Northville case at bar, the authority delegated to the superintendent of public instruction over the design and construction of school buildings is supported by sufficient standards contained in Act 306 of the Public Acts of 1937 referred to in the 1990 School Code amendment that delegated such authority. In contrast, however, zoning decisions by the superintendent of public instruction are not similarly supported by any standards, and accordingly, must remain the prerogatives of the local units of government properly delegated such authority in the various zoning enabling acts.

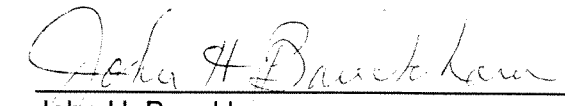
CONCLUSION

For all the foregoing reasons, the decision of the Court of Appeals must be reversed and public and private schools be determined to be subject to all reasonable local zoning regulations properly enacted by a local municipality such as the Charter Township of Northville and designed for the protection of the health, safety and general welfare of the community and its citizens and property owners and unrelated to the construction and design of the school buildings themselves.

Respectfully submitted,

Dated: December 20, 2002

BAUCKHAM, SPARKS, ROLFE, LOHRSTORFER & THALL, P.C.



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JHB:paj

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ATTACHMENT A

STATE OF MICHIGAN

COURT OF APPEALS

MARK O'BRIEN and SUSAN O'BRIEN,

Plaintiffs-Appellees,

v

EAST CHINA TOWNSHIP SCHOOL DISTRICT,

Defendant-Appellant,

and

CITY OF ST. CLAIR,

Defendant.

UNPUBLISHED

January 6, 1995
No. 161780
LC No. 92-002588-CE

Before: Doctoroff, C.J., and T.G. Kavanagh* and R.C. Livo,** JJ.

MEMORANDUM.

Defendant East China Township School District ("defendant") appeals as of right from the trial court order that granted a preliminary injunction against the construction of a school parking lot. We affirm in part and reverse in part.

Having reviewed the language of the school code, MCL 380.1263(3); MSA 15.41263(3), we find an express legislative intent to preempt local site plan review. Dearden v Detroit, 403 Mich 257, 264; 269 NW2d 139 (1978). On the other hand, read in the context of the construction of school buildings act, MCL 388.851 through 388.855a; MSA 15.1961 through 15.1966, to which the school code explicitly refers, we find no concomitant intent to preempt local zoning regulations which do not interfere with the state superintendent's "sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction, or remodeling of school buildings . . . and of site plans for those school buildings." MCL 380.1263(3); MSA 15.41263(3); Cody Park Ass'n v Royal Oak School Dist, 116 Mich App 103, 107-109; 321 NW2d 855 (1982). Thus, the trial court abused its discretion in requiring compliance with the site plan review ordinance but did not abuse its discretion in requiring compliance with the special approval uses ordinance. Azzar v Primebank, FSB, 198 Mich App 512, 520; 499 NW2d 793 (1993).

As an additional basis for our decision, we note that the ordinance requires site plan review for additions to existing uses such as this one only in certain districts not including the single family districts at issue here. See City of St. Clair Ordinance § 9.1.1.(F) and (A).

Lastly, we agree with the trial court that plaintiffs' five-month delay in bringing suit did not amount to laches or lead to detrimental reliance by defendant since plaintiffs always made known their continuing opposition to the project.

Affirmed in part, and reversed and in part. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Thomas Giles Kavanagh
/s/ Robert C. Livo

*Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order No. 1994-7.
**Circuit judge, sitting on the Court of Appeals by assignment.

ATTACHMENT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

NEW BEGINNINGS ACADEMY, INC.,
and WWEFST COMPANY,

Plaintiffs,

vs

Case No. 99-10608 CE
Honorable Melinda Morris

CITY OF YPSILANTI,

Defendant.
/

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/

OPINION AND ORDER DENYING PLAINTIFFS' REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF

At a session of the Court held in the
Washtenaw County Courthouse in
the City of Ann Arbor on
August 3, 1999

PRESENT: HONORABLE MELINDA MORRIS, Circuit Judge

Plaintiffs New Beginnings Academy, Inc., ("New Beginnings") and WWEFST Company filed a complaint for declaratory and injunctive relief against defendant City of

99032 A

Ypsilanti ("the City") on May 13, 1999, challenging the City's attempt to regulate plaintiffs' building of an elementary school in the City. Plaintiffs sought a preliminary injunction; a declaration that the City's zoning ordinance, to the extent it purports to authorize the City to do so, conflicts with MCL 380.1263(3) and is therefore invalid; and a permanent injunction prohibiting defendant from asserting any jurisdiction and control over the plans and construction of the school. Plaintiffs filed a brief in support of the complaint. Defendants filed an answer to the complaint and a supporting brief. On May 26, 1999, this Court denied plaintiffs' motion for a preliminary injunction and took their request for declaratory relief and permanent injunction under advisement. Now, for the reasons stated below, plaintiffs' request for a declaratory judgment and permanent injunction is denied.

I. BACKGROUND

Plaintiff New Beginnings Academy, Inc., is a Michigan non-profit corporation public school, which was approved as a non-profit public school academy on March 19, 1999, and incorporated on April 19, 1999. New Beginnings wishes to construct an elementary school (for grades kindergarten through third grade) and be ready to begin instruction of students in August 1999 on its property located in the City of Ypsilanti. The property, which New Beginnings is purchasing from plaintiff WWEFST, is zoned RO Residential-Office District.

New Beginnings has prepared a site plan and construction drawings and submitted them to the Superintendent of Public Education for the State of Michigan for review and approval pursuant to MCL 380.1263(3). As of the date plaintiffs filed their

complaint, they were awaiting the Superintendent's approval. Following approval by the Superintendent, New Beginnings intends to commence site preparation and construction of the school, to be completed in time for the August 1999 semester. New Beginnings alleges that, since it is a public school, enrollment of students by the beginning of the school year 1999-2000 is critical to its receipt of State funding, which is based on student enrollment.

As of the date of filing, however, New Beginnings has been unable to begin enrollment. It cannot begin enrollment without a school building or an alternate location to conduct classes, which it does not have. The City, however, has demanded that New Beginnings apply for and obtain from the City a special land use approval for the school, and, upon plaintiff's information and belief, will issue a stop work order or otherwise interfere with the operation of the school unless plaintiff does so.

II. ANALYSIS

The Michigan Constitution, Art 7, § 21, and MCL 117.1 give a home-rule city, such as defendant City of Ypsilanti, the power to establish zoning ordinances and districts. The City has enacted such an ordinance, the City of Ypsilanti Zoning Ordinance, sections 5.214(4), 5.284 and 5.66 of which purport to apply to the subject property. These sections delineate schools as permissible special uses within an RO district. Zoning Ordinance, §§ 5.214(4) (describes schools as a special use) and 5.66 (special uses within an RO district include schools). Sections 5.280, *et seq*, describe the special use review process and require that all school buildings "meet the building and safety fire qualifications as established by the state of Michigan." § 5.214(4)(b).

a. *Plaintiffs' argument*

Plaintiffs argue that defendant's ordinance is void and completely pre-empted by MCL 380.1263(3). The statute states that a public school board shall not build a school building unless the design or construction complies with MCL 388.851-388.855a, and that "The Superintendent of Public Instruction *has sole and exclusive jurisdiction over the review and approval of plans and specifications for the construction, reconstruction or remodeling of school buildings* used for instructional or non-instructional school purposes and of site plans for those school buildings" (emphasis supplied). Defendant's zoning ordinance, which requires an applicant for a special land use permit to submit a site plan to and obtain the approval of defendant's Planning Commission, invades the sole and exclusive jurisdiction of the Superintendent and is invalid on its face. Even if it is not invalid on its face, the application of the special land use standards to plaintiff school is invalid.

Plaintiffs support their argument by pointing to the legislative intent behind the statute. The legislature enacted MCL 380.1263(3) in 1990, plaintiffs state, in response to two Court of Appeals decisions in which it was held that schools were not exempt from local zoning ordinances, *Cody Park Ass'n v Royal Oak School Dist*, 116 Mich App 103 (1981), and *Lutheran High School Ass'n of Greater Detroit v City of Farmington Hills*, 146 Mich App 641 (1984). The legislature wanted to correct the problem it perceived to exist of local municipalities attempting to exercise their zoning/building code powers over the construction or renovation of school buildings. Despite opportunities in 1991-92, 1993-94 and 1995, plaintiffs assert, the Michigan legislature opted not to amend this statute or to remove this issue from the Superintendent's jurisdiction.

In addition, at pages 8-9 of their Brief, plaintiffs quote from the Michigan Department of Education School Plant Planning Handbook,[1] which identifies certain factors or aspects to be considered regarding a proposed site when a school is to be built. These include the responsibility involved in the stewardship of public land and the preservation of fundamental values of the land; potential transportation problems; the possibility that housing patterns in the area would result in a racially, ethnically or socio-economically segregated school population; preservation of natural features such as natural surface elevations, natural water and natural vegetation on the site; and the provision on the site for such as incidental necessities as off-street parking, bus loading areas and drive lanes, automobile drive lanes and loading areas, and routes for delivery of supplies and removal of trash and garbage.

Finally, plaintiffs cite as persuasive authority an opinion of the Wayne County Circuit Court, in which that court held that a similar ordinance in Flat Rock could not be applied to public school academies, and Flat Rock's application for leave to appeal to the Court of Appeals and Michigan Supreme Court were denied. *City of Flat Rock v Summit Academy*, Unpublished Opinion, Case No 98-815859 CE (Wayne County Circuit Court, June 19, 1998) (copy attached as Exhibit 8 to Brief in Support of Plaintiffs' Complaint), Docket No 212509 (Mich Court App, July 15, 1998) (Plaintiffs' Brief, Exh 9), Docket No 112762 (Mich, September 28, 1998) (Plaintiffs' Brief, Exh 10).

[1] It is not clear from plaintiffs' submissions whether the title of this publication is accurately stated in plaintiffs' brief or perhaps the word "Plant" is included by accident. Plaintiffs have not attached a copy of the document nor included a citation which would allow the Court to review the document itself.

b. *Defendant's argument*

As stated above, MCL 117.1 gives a home-rule city the power to establish zoning ordinances and districts, etc. MCL 125.5(1), *et seq*, provides for the structure of such zoning ordinances. The City has enacted its zoning ordinance in accordance with these sections, and its ordinance is a legal method of organizing the community. Plaintiff presented a request for a special land use permit to the City. After a public hearing, the Planning Commission concluded that, given the proximity of the proposed school to a bar and the fact that the proposed school had a concrete playground, it would not pass on the request (5-0 vote).

What plaintiffs overlook, defendant contends, is that zoning has to do with more than just construction issues. The issue with plaintiffs' school is not so much how the school is constructed, but its location within a particular zoning district and the adjacent land uses. The Planning Commission based its decision on plaintiffs' application exclusively on the undesirable location of the proposed school – next to a bar – and the inadequacy of the proposed playground (cement). Under plaintiff's argument, a potential developer could put a school anywhere within a zoning district, regardless of such things as adjacent businesses, traffic flow, etc., so long as it complied with the State construction and site plan requirements.

c. *Other statutory language*

MCL 388.851 provides that no school building shall be "erected, remodeled or reconstructed in the state except it be in conformity with" the provisions of 388.851(a) through (f). These subsections require that plans for school buildings be prepared by and construction supervised by a registered architect or engineer; that written approval of the

plans and specifications be obtained from the superintendent of public instruction before construction begins, and that approval shall not be issued until the state fire marshal or appropriate municipal official has made certification "relative to factors concerning fire safety" and certification has been obtained from "the health department having jurisdiction relative to factors affecting water supply, sanitation and food handling"; that all walls, floors, etc., be constructed of specific fire-resistant materials; that the heating units be enclosed by walls and doors of specific types; and that adequate exits and stairways be provided for the building.

MCL 388.851a contains definitions of some of the terms used in the statute: it does not define "construction," but it does define "remodeling" as "the alteration, construction or remodeling of *partitions, hallways, stairways and means of egress, the replacement, relocation or reconstruction of heating, ventilating and sanitary equipment.*" MCL 388.851a(b) (emphasis supplied).

These sections deal very specifically with the physical construction details of schools and are concerned with the safety of the building with regard to fire, ventilation and sanitation. As defendant argues, these concerns and requirements are not related to concerns regarding the *location* of a school building within a community – here, next to a bar. Other possible inappropriate locations spring to mind as well: in close proximity to a gun shop or an adult bookstore specializing in sado-masochistic materials, for example. The school statute does not address concerns of this type anywhere, and they seem to the Court to be legitimate concerns for a community, and therefore a legitimate area in which it may exercise its police powers.

Furthermore, none of the provisions or requirements of the City's ordinance conflict in any way with the school statute. That there are two sets of application procedures with which plaintiffs must comply in order to build their school does not create a conflict where, as it appears here, the requirements are not contradictory or mutually exclusive. And, as defendant points out, the Zoning Ordinance expressly states that all school buildings must meet the building and safety fire qualifications as established by the state of Michigan, which are exactly what is governed by the school statute.

Plaintiffs have not supplied the Court with a copy of the Department of Education [Plant] Planning Handbook on which they rely for part of their argument. The sections plaintiffs have quoted in their brief consist of recommendations as to what are some important considerations regarding the physical site of a school. These recommendations and considerations, however, appear to be primarily the preservation of natural features such as topography and vegetation. Furthermore, they are not requirements, but guidelines or suggestions. They do not demonstrate that the exclusive power to approve the location of a school within a community lies with the Superintendent of Schools, rather than conjointly with the Superintendent and the municipality in which the school is to be located.

III. CONCLUSION

For the reasons stated above, plaintiffs' motion for declaratory and injunctive relief is denied.

Melinda Morris

Melinda Morris
Circuit Court Judge

ATTACHMENT C

STATE OF MICHIGAN

COURT OF APPEALS

FRENS ORCHARDS, INC.,

Plaintiff-Appellant,

v

DAYTON TOWNSHIP BOARD, DOROTHY DYKHOUSE, Dayton Township Zoning Administrator, and DUANE CRUZAN, Newaygo County Building Inspector,

Defendants-Appellees,

and

MICHIGAN TOWNSHIPS ASSOCIATION,

Amicus Curiae.

FOR PUBLICATION
September 24, 2002
9:00 a.m.

No. 225696
Newaygo Circuit Court
LC No. 99-17916-CE

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

WILDER, P.J.

In this declaratory judgment action, plaintiff appeals from the trial court's order granting partial summary disposition to defendants Dayton Township Board (the township) and Dorothy Dykhouse.[1] The trial court rejected plaintiff's claim that land use restrictions in the township zoning ordinance are preempted by state statutes and administrative rules regarding migrant labor housing. We affirm.

I. Facts and Proceedings

Plaintiff operates a farm in Dayton Township where it grows various fruits and vegetables that require hand harvest. In order to facilitate the harvest, plaintiff employs forty to fifty migrant agricultural workers during the harvest season each year. Like many other farms of this nature, plaintiff provides temporary housing for its migrant agricultural workers. To meet its

[1] The trial court granted plaintiff summary disposition on its claim that new construction of migrant housing does not require a permit under the State Construction Code. See MCL 125.1528. That decision is not a subject of this appeal.

future labor needs, plaintiff decided to build three additional housing units to accommodate more agricultural workers. Plaintiff sought and obtained preliminary authorization from the Michigan Department of Agriculture, as required, to construct the additional housing. However, plaintiff was informed that in order to proceed with construction, it needed to obtain a special exception use permit from the township board because the township's zoning ordinance does not permit this type of housing in the Agricultural-3 (A-3) district where plaintiff's land is situated.

Rather than seeking the special exception use permit, plaintiff filed the instant action seeking a declaration that portions of the Michigan Public Health Code,[2] Michigan Occupational Safety and Health Act (MIOSHA),[3] and related administrative rules pertaining to agricultural labor camps preempt the township's ordinance restricting the location of housing for migrant laborers. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10) on the issue, which the trial court denied. Instead, the trial court granted summary disposition to defendants. This appeal followed.

II. Standard of Review

We review the trial court's decision on a motion for summary disposition de novo. *Pohutski v City of Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002). We also review questions of statutory interpretation de novo. *Id.*

III. Analysis

Defendant's authority to regulate the use of land within Dayton Township is derived from the Township Rural Zoning Act, MCL 125.271 *et seq*. The township's authority under the act is broad and is to be liberally construed in favor of the township. Const 1963, art 7, § 34; *Cornerstone Investments, Inc v Cannon Twp (On Remand)*, 239 Mich App 98, 102; 607 NW2d 749 (1999). Article VI of the Dayton Township Zoning Ordinance (the ordinance) governs A-3 districts, and sections 6.01 to 6.05 address the permitted and prohibited uses of land within these districts. Migrant labor housing is not specifically listed in Article VI as a permitted use, a prohibited use, or as an additional use permitted under special conditions. Therefore, locating migrant labor housing in an A-3 district is permissible only if the user obtains a "special exception use permit" as detailed in Article XVIII of the ordinance.

Plaintiff argues that the limitations on the location of migrant labor housing are invalid because they are preempted by state law. A state law preempts an ordinance "if 1) the statute completely occupies the field that the ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute." *Rental Property Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). Plaintiff argues that preemption exists for both of these reasons. We disagree.

To determine whether a statute completely occupies a field of regulation so as to preempt local control, the following guidelines apply:

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[2] MCL 333.12401 *et seq*.

[3] MCL 408.1001 *et seq*.

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted. *Noey v Saginaw*, 271 Mich 595; 271 NW 88 (1935).
>
> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history. *Walsh v River Rouge*, 385 Mich 623, 189 NW2d 318 (1971).
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. *Grand Haven v Grocer's Cooperative Dairy Co,* 330 Mich 694, 702; 48 NW2d 362 (1951) . . . While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. [*Rental Property Owners, supra* at 257, quoting *People v Llewellyn*, 401 Mich 314, 323-324; 257 NW2d 902 (1977).]

Here, plaintiff asserts that preemption arises under the third and fourth of these guidelines. With regard to pervasiveness, plaintiff argues that regulation of migrant labor housing in part 124 of the Public Health Code, MCL 333.12401 *et seq.*, MIOSHA, MCL 408.1001 *et seq.*, and administrative rules promulgated pursuant to their authority is so extensive that any local control has been preempted.

The sections of the Public Health Code plaintiff relies upon require the "camp operator" (in this case, plaintiff) to apply for a license to operate an agricultural labor camp. MCL 333.12411-333.12412. The department will issue the license if after investigating and inspecting the camp, it "finds that the camp and its proposed operation conforms or will conform to the minimum standards of construction, health, sanitation, sewage, water supply, plumbing, garbage and rubbish disposal, and operation set forth in the rules promulgated under section 12421." MCL 333.12413. The administrative rules promulgated pursuant to the act further regulate the camps to ensure the health and safety of migrant laborers. For example, 1999 AC, R 325.3611 requires that an agricultural camp be well drained and free from offensive odors, flies, noise, traffic, debris, noxious plants, and uncontrolled weeds, plants, or brush. Other rules similarly regulate the health and safety conditions of the camp, setting standards for water supply, construction methods and materials, fire safety and first aid, electric supply to a shelter, bathing, toilet, and laundry facilities, and sewage, garbage, and refuse disposal. 1999 AC, R 325.3613-325.3631. Both the statutes and rules, however, regulate the *location* of a camp only in terms of its relationship to other conditions that would affect the health and safety of the camp's occupants. We conclude, therefore, that the location of agricultural labor camps is not pervasively regulated by the Public Health Code or its associated administrative rules.

We find further support for our conclusion in the language of MCL 333.1203 and R 325.3605, where local control of migrant housing is expressly permitted. MCL 333.1203, found in the general provisions of the Public Health Code, states:

> The approval of plans or the issuance of a permit pursuant to this code which involves the construction, alteration, or renovation of a building, structure, or premises . . . does not relieve the person receiving the approval or permit from complying with all consistent applicable provisions of building and construction laws, zoning requirements and other state and local statutes, charters, ordinances, rules, regulations, and orders. [MCL 333.1203.]

Here, the applicable provisions of the zoning ordinance are those that affect the use of plaintiff's land. Plaintiff contends that these provisions are not consistent with the Public Health Code, and that they violate the statute. However, because the location of an agricultural labor camp within the township is not contemplated in the cited portion of the Public Health Code, we cannot conclude that the applicable provisions of the ordinance are inconsistent with the statutory requirements.

Similarly, R 325.3605(1) states that "[t]hese rules apply to all agricultural labor camps. A provision in these rules shall not take precedence over a requirement in an applicable local rule, ordinance, or code when such requirement is more stringent than the provision in these rules." Although the rules do not contain a provision that parallels the location limitation in the zoning ordinance, this rule demonstrates that local control of agricultural labor camps is still permitted.

Likewise, the cited portions of MIOSHA do not address the location of the camps. Plaintiff argues that "Rule 4301" governs temporary labor camps, but this rule is not a part of the administrative code and does not have the force of law. *Clonlara v State Bd of Education*, 442 Mich 230, 239; 501 NW2d 88 (1993).

In sum, a reading of the pertinent sections of the zoning ordinance in conjunction with the cited statutes reveals that the ordinance addresses concerns not affected by the statutes and administrative rules discussed above. Therefore, the state's regulation is not so pervasive that it would support a finding of preemption.

With regard to the fourth guideline in *Rental Property Owners*, plaintiff argues that the nature of migrant labor housing requires a uniform system of regulation within the state. With regard to the condition of the housing, this is certainly true. Inspectors need to be able to apply the same standards of suitability and safety wherever the housing is located throughout the state. With regard to the location of the housing within a township, however, this is not the case. Zoning ordinances can address the unique residential, commercial, and agricultural needs of each township, unlike statewide regulations Different areas in our state have differing needs for migrant labor, as a review of the migrant labor statistics by county that plaintiff submitted plainly shows. Plaintiff contends that overly restrictive zoning ordinances have led to a shortage of affordable housing for migrant workers. If this is the case, re-zoning may or may not be appropriate, but this problem does not support a finding of preemption.

We also find that the zoning ordinance is not preempted because of a conflict between the zoning ordinance and state laws and rules. In *Rental Property Owners*, *supra* at 262, the Court adopted the following language from 56 Am Jur 2d, Municipal Corporations, § 374, pp 408-409:

> It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the same subject, the test *is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits.* Accordingly, it has often been held that a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required, or authorize what the legislature has expressly forbidden. [Emphasis in original.]

Using this test, we find that no conflict exists here because the state regulations do not address the subject of the zoning ordinance—the location of a use of land within the township.

Finally, plaintiff argues on appeal that because the trial court stated that state regulation did not "totally exempt" a person from complying with the local zoning authority, it meant to indicate that some degree of preemption did exist and that it abused its discretion by failing to resolve this question in its ruling on plaintiff's motion for reconsideration. We disagree. The trial court's language in its conclusion simply mirrored the manner in which the issue had been previously phrased: whether "the state regulatory scheme for migrant housing *totally preempts* local zoning ordinances" (emphasis added). The trial court did not find that preemption existed to any extent.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra